06-766

IN THE

Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, *et al.*,

Petitioners,

—v.—

MARGARITA LOPEZ TORRES, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND NEW YORK CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENTS

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INTRODUCTION AND INTEREST OF AMICI[1]

This case involves a constitutional challenge to an elaborate regime governing the election of judges who seek to serve on the New York State Supreme Court, which is the State's principal trial court. This electoral system calls upon the major parties to nominate their candidates for judicial office at conventions held by each party for each of the twelve judicial districts in the State. The delegates to these conventions must, themselves, stand for election. To do so, they are required to petition their way onto a ballot and run in a primary election held a week or two prior to the conventions. The elected delegates from each party then meet at conventions and nominate the parties' candidates for judicial office. The judicial candidates nominated by the parties subsequently appear on the general election ballot. In a challenge to the constitutionality of this statutory scheme, the lower courts found that this electoral system is so complex and erects barriers to the ballot that are so formidable as to be navigable only by the party leadership that controls the machinery and resources of the major parties.

Indeed, the lower courts effectively found that despite the state constitutional requirement that judges serving on the New York State Supreme Court must be elected, the system for choosing these judges involves no real election at all. Rather, the trappings of an electoral system are deployed to create the barest illusion of an elected judiciary. In reality,

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[1] Pursuant to Rule 37.3, letters of consent from Petitioner New York County Democratic Committee and the New York State Attorney General, as a statutory intervenor in this matter, have been filed with the Clerk of the Court. All other parties have filed blanket letters of consent. Pursuant to Rule 37.6, counsel for *amici* state that no counsel for a party has authored this brief in whole or in part, and no person or entity, other than *amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

the judges are hand-picked by the party leadership without any real electoral competition and in disregard of the state constitutional commitment to democratic processes. Judicial candidates who do not enjoy the support of the party leadership are closed out of the electoral process. Consequently, the federal District Court properly concluded that such a regime unconstitutionally denied insurgent candidates for judicial office and voters who would support these candidates a realistic opportunity to participate in an authentic electoral process. The Court of Appeals affirmed the District Court decision.

The New York State Board of Elections, the New York County Democratic Committee and the New York Republican State Committee, among others, have petitioned this Court for review of the Court of Appeals decision. In doing so, Petitioners have argued, *inter alia*, that constitutional protections accorded to the right to participate in elections (to vote, to run for office and to associate in support of candidates) do not reach New York's statutory regime challenged in this case. Petitioners further contend that the constitutional challenge mounted in this case intrudes impermissibly into the associational rights of the parties' leadership to choose their standard bearers. This Court has granted certiorari review.

This case, therefore, raises important constitutional questions regarding the scope of the constitutional right to participate in a state-mandated electoral process governing the nomination of candidates seeking elected office. The American Civil Liberties Union (ACLU) is a nonprofit, nonpartisan organization with more than 550,000 members nationwide that has long been devoted to the protection and enhancement of fundamental constitutional rights. The New York Civil Liberties Union (NYCLU) is one of its statewide affiliates and shares the ACLU's commitment to fundamental rights and liberties. The right to vote and to associate with candidates who run for office are among the most

fundamental of rights as they are "preservative of all [other] rights." (*Reynolds v. Sims*, 377 U.S. 533, 562 (1964), *citing Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)). Accordingly, the ACLU and NYCLU respectfully submit this brief to address the fundamental issues raised by this case.

STATEMENT OF THE CASE

The New York State Supreme Court is the court of general and original jurisdiction throughout the State. The justices who serve on this court are the State's principal trial judges. Under New York law, these judges are elected to judicial office pursuant to an elaborate electoral scheme commonly described as the "judicial convention" system. N.Y. Const., Art. VI, § 6(c); N.Y. Elec. L. §§6-106, 124, 158.

The New York Election Law requires that each major party nominate its candidates for the office of Justice of the Supreme Court at party conventions held in and for each of the twelve judicial districts within the State. These judicial districts are quite large. Each one contains at least nine and as many as twenty-four assembly districts, the geographic districts from which members of the New York State Assembly are elected. *Lopez Torres v. N.Y. State Bd. of Elections*, 462 F.3d 161, 172 (2nd Cir. 2006).

Delegates to each of the judicial conventions are chosen at primary elections held in September preceding the November general election. To appear on the primary election ballot, each potential delegate must, over a 37-day period, gather 500 valid signatures from party members residing in their assembly district on a designating petition to be filed at the close of the petitioning period. Each party member may sign only one designating petition.[2] New York

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[2] As the Court of Appeals noted, "because petition signatures are routinely and successfully challenged, pursuant to the one-petition signature rule, among others, each delegate slate must realistically gather

law allows the political parties to determine the number of delegates from each assembly district subject to the requirement that the delegations from the assembly districts must be "substantially" apportioned on the basis of the votes cast within each assembly district for the party's last gubernatorial nominee. *Id.* at 173.

These petitioning requirements present formidable impediments to candidates who seek judicial office without the support of the party leadership. The District Court found that "frequently as many as 6 or 7 delegates are elected from each A[ssembly] D[istrict] to attend the nominating convention for Supreme Court candidates." *Lopez Torres v. N. Y. State Bd. of Elections*, 411 F. Supp. 2d 212, 219 (E.D.N.Y. 2006). A candidate who seeks judicial office without the support of the party leadership must enlist, organize and promote slates of delegates across an entire judicial district by organizing slates from each of the constituent assembly districts. Thus, by way of example, the District Court found that "a challenger candidate for the Supreme Court in Brooklyn or Staten Island would need to gather 24,000 to 36,000 signatures drawn equally from the 24 ADs in the [judicial] district." *Id.* at 221. It noted ironically that "it is considerably easier for an aspiring [candidate] to petition ... onto the ballot for the office of Mayor of New York City (7,500 signatures – 15,000 to 22,500 as a practical matter – from anywhere in the city) than it is to petition onto the ballot slates of delegates to a judicial nominating convention." *Id.*

The burdens imposed by the petitioning process upon candidates who do not enjoy the support of the party leadership are not experienced by those in control of party resources. The District Court explained:

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between 1,000 and 1,500 signatures to gain a primary ballot position." *Lopez Torres*, 462 F.3d at 173

> [T]he petitioning process is rather easy for the major party organizations. Slates of judicial delegates are included on omnibus petitions on which signatures are obtained for other candidates seeking other offices. The county and district leaders can easily mobilize the resources necessary to conduct the petition drives throughout the judicial districts because they are collecting signatures in all of those ADs anyway, for a variety of other party and public offices. Thus, when deciding who to run for the array of offices set for election, the party leaders also decide who to run as judicial delegates and alternates.

Id.

Moreover, the burdens imposed upon insurgent candidacies are not limited to the difficulties of the petitioning process. After the petitioning process concludes, the State Board of Elections determines which Assembly Districts present contested delegate elections. As the Second Circuit observed, "[i]f only one group of delegates has filed designating petitions in an assembly district, then those delegates are 'deemed elected.' Delegates who are 'deemed elected' do not appear on the primary ballot." *Lopez Torres*, 462 F.3d at 173 (citing N.Y. Elec. Law § 6-160(2).

If, however, delegate elections are contested, names will appear on a ballot but the ballot will not identify the judicial candidate or candidates that the delegates will be supporting. Voters will not know whether the delegates are supporting the candidates of the party leadership or those opposing the party leadership. Accordingly, the current regime presents serious problems of voter education and informed decisionmaking. In this regard, the Second Circuit observed:

> ...in order to run delegate slates in any useful fashion, the judicial candidate must inform the primary electorate in each assembly district of which delegates are pledged to her in that specific locale. In the

> Second Judicial District, for example, which encompasses Brooklyn and Staten Island, a judicial candidate who ran a slate in each assembly district would have to mount 24 different voter education campaigns. In the Fourth Judicial District, which encompasses roughly one quarter of the State's land, a judicial candidate seeking to run a slate in each assembly district must conduct 10 different voter education campaigns across 11 different counties.

Id. at 173-174.

The burdens imposed upon insurgent candidacies by the delegate selection process cannot be cured simply by having those who would seek judicial office lobby the elected delegates or attend the conventions in an effort to enlist support from the delegations. There are three reasons for this. First, the conventions are held one or two weeks after the primary elections, leaving insufficient time to lobby the scores of delegates to the convention. The Second Circuit noted: "... candidates have only two weeks to lobby at least 64 delegates and as many as 248, depending on the judicial district in which they were running." *Id.* at 176. Second, as the District Court observed, "[m]ost delegates have strong ties to the district leaders who select them, and sometimes work for them as well." *Lopez Torres*, 462 F. Supp. 2d at 223. As Defendants' expert Douglas Kellner conceded: "By definition, the convention system is designed [so] that the political leadership of the party is going to designate the party's candidates. Specifically, judicial delegates are part of the party leadership and responsive to it and make it up, you know, constitute the party leadership." *Lopez Torres*, 462 F.3d at 199. Third, the judicial conventions are such "perfunctory affairs" as to be characterized by the Second Circuit as "fleeting" in their brevity. *Id* at 178. The Court below found that "[o]ver a 12-year span, conventions statewide averaged a mere 55 minutes in length. In 1996, the

Second Judicial District's convention lasted 11 minutes but yielded eight nominees." *Id.*

The final aspect of the electoral process under review involves the general elections for judicial office. One-party dominance is a common feature of such elections. Thus, the Second Circuit concluded:

> Empirical evidence showed that because one-party rule is the norm in most judicial districts, the general election is little more than ceremony. Over a 12-year period between 1990 and 2002, almost half of the State's elections for Supreme Court Justice were entirely uncontested, meaning that only one party's candidate appeared on the ballot. In certain judicial districts, contested elections verged on the non-existent. In the Sixth Judicial District, 91 percent of judicial elections were uncontested during the 12-year time span. In the First Judicial District, 85 percent of judicial elections were uncontested. In eight of the state's 12 judicial districts, more than half the elections were uncontested, which left 62 percent of the State's voters with no choice to make on the November ballot.

Id. Even in districts where one party does not necessarily predominate, the judicial elections are often not contested. As the District Court observed: "the Democratic Party and the Republican Party essentially divvy up the judgeships through cross-endorsements." *Lopez Torres*, 411 F. Supp. 2d at 231.

In sum, New York's system of electing judges to serve on its State Supreme Court can scarcely be regarded as an electoral system at all. The New York Constitution requires that such judges be elected. Yet the current statutory scheme effectively allows the party leadership to choose the candidates and, in most instances, the ultimate officeholders. It imposes serious and unwarranted obstacles upon insurgents who seek to challenge the choices of the party leaders. The

federal District Court found such a statutory regime unconstitutional in a decision rendered on January 27, 2006. By way of relief, the District Court recognized that the remedy for this unconstitutional regime must ultimately be left to the State Legislature. But the Court ordered, as an interim matter, that judicial nominations proceed by direct primary election until such time as the Legislature enacts corrective legislation. The Second Circuit, in a decision issued on August 20, 2006, affirmed the District Court decision, including the interim relief ordered by the District Judge.[3]

SUMMARY OF ARGUMENT

The State of New York is not obligated by the federal Constitution to adopt an electoral system for the nomination and ultimate election of its judicial officers. But having chosen to elect the Justices of its State Supreme Court, New York is obligated by the federal Constitution to provide for a fair and accessible electoral process. This it has not done.

The liability decision of the Court of Appeals in this case is amply supported by this Court's precedent. Three discrete doctrinal formulations fashioned by this Court to protect rights of electoral participation are potentially applicable to the statutory regime at issue in this case. All support the judgment of the courts below, which both sit in New York and are thus presumptively familiar with the challenged electoral scheme.[4]

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[3] Although *amici* support the conclusions of the District Court and the Court of Appeals that New York's statutory regime is unconstitutional, *amici* do not take a position with respect to the issue of remedy, either as a permanent matter or as a matter of interim relief.

[4] The record in this case is also voluminous. The district court hearing lasted 13 days and included 24 witnesses and 10,000 pages of documentary evidence. 462 F.3d at 172.

In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), this Court applied a sliding-scale approach, embraced by later cases, *see Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997); *Clingman v. Beaver*, 544 U.S. 581 (2005), under which severe burdens upon rights of electoral participation trigger rigorous judicial scrutiny. The record developed in this case leaves no doubt that the statutory regime at issue imposes severe burdens upon rights of electoral participation. Applying strict scrutiny, the Court below properly found these severe burdens unnecessary to the advancement of any compelling interest.

In *Williams v. Rhodes*, 393 U.S. 23 (1968), this Court invalidated Ohio laws that operated to freeze the political status quo and stifle electoral competition. The record adduced in this case supports a similar conclusion with respect to the statutory regime at issue here.

In *Storer v. Brown*, 415 U.S. 724, 742 (1974), this Court suggested that the constitutionality of laws that restrict candidate access to the ballot could be evaluated by asking whether, under the laws in question, "a reasonably diligent ... candidate" could secure ballot access. Under this standard, as well, the statutory regime at issue here fails. Viewed individually, each of the doctrinal approaches developed by this Court therefore supports the invalidation of New York's electoral scheme. In combination, the application of these doctrinal standards reinforces the correctness of the lower court decisions.

Petitioners incorrectly assert that the constitutional right of electoral participation does not protect the right to participate in primary elections where candidates and their supporters have access to the general election ballot. This Court has long held that the right to vote and to associate in support of candidacies embraces the right to participate in primary as well as general elections. The Court has also recognized that this right extends not only to race-based exclusions from the franchise but to other circumstances

where individuals are being effectively denied the opportunity to associate with a political party. Moreover, participating in the general election only as an "independent" candidate or as supporters of that candidate is no substitute for associating with the political party in which one is a member.

Petitioners' argument that the lower court decisions intrude impermissibly on the associational rights of the party leadership is similarly flawed. This argument ignores the fact that the constitutional challenge in this case is directed at a state-mandated scheme, not at private associational conduct. This argument also ignores the constitutional obligations that can be imposed upon political parties when they function as joint-participants with the State in the nominating process as integral components of the electoral system. In sum, New York has enacted an electoral system for the nomination of candidates for judicial office. As such, that system is subject to constitutional constraints.

ARGUMENT

I. THE DECISIONS OF THE LOWER COURTS IN THIS CASE ARE AMPLY SUPPORTED BY THIS COURT'S PRECEDENT

This Court has long recognized that "the rights of voters and the rights of candidates do not lend themselves to neat separation." *Bullock v. Carter*, 405 U.S. 134, 143 (1972). It has noted that "laws that affect candidates always have at least some theoretical ... effect on voters." *Id.* It has observed that laws that restrict access by candidates to the ballot burden "two different, although overlapping" aspects of the right to vote: first, "the right of individuals to associate for the advancement of political beliefs"; and second, "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). "Both of these rights,"

the Court has remarked, "rank among our most precious freedoms." *Id.* Both of these rights are implicated by the current controversy.

Recognizing these "most precious freedoms" as "preservative of all [other] rights," *Reynolds v. Sims*, 377 U.S. at 562, citing *Yick Wo*, 118 U.S. at 370, the Court has, over time, developed and applied a variety of doctrinal standards and principles designed to protect the rights of electoral participation -- to vote, to run for office and to associate in support of candidates. The broadest and most encompassing doctrinal formulation was that offered by the Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). *Anderson* involved a constitutional challenge to an early filing deadline imposed upon independent candidates seeking the presidency. In evaluating this challenge, the Court urged a careful sifting of the facts and of the competing interests at stake. It announced that a reviewing court

> must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which these interests make it necessary to burden the plaintiff's rights. Only after weighing all the factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson, 460 U.S. at 789.

Applying this approach, the *Anderson* Court concluded that Ohio's filing deadline imposed a substantial burden on the rights of voters and candidates. Then, citing to *Dunn v. Blumstein*, 405 U.S. 330 (1972), a case in which this Court applied strict judicial scrutiny to invalidate

Tennessee's durational residency requirement for voting, the *Anderson* Court closely scrutinized the Ohio enactment. 460 U.S. at 806. Finding that the State's interests could be satisfied in "a less drastic way," the *Anderson* Court invalidated the Ohio law. *Id.*

In essence, the *Anderson* Court suggested a sliding-scale approach in which more severe burdens on electoral participation would trigger more intensive judicial scrutiny. Later cases have expressly articulated and applied such an approach. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997); *Clingman v. Beaver*, 544 U.S. 581 (2005). Thus, in *Clingman* this Court announced that "[r]egulations that impose severe burdens on associational rights must be narrowly tailored to serve a compelling interest. [Citing *Timmons*, 520 U.S. at 358]. However, when regulations impose lesser burdens, 'a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.'" *Clingman*, 544 U.S. at 586-587.

In *Williams v. Rhodes*, 393 U.S. 23, the Court articulated and applied a somewhat different principle in reviewing Ohio's statutory framework governing access to the ballot by independent parties. *Williams* involved "a series of election laws" adopted in Ohio that "made it virtually impossible for a new political party ... to be placed on the state ballot" even "though it [had] hundreds of thousands of members ...." *Williams*, 393 U.S. at 24.

In reviewing this statutory scheme, this Court observed that "the Ohio system does not merely favor a 'two-party system'; it favors two particular parties – the Republicans and the Democrats – and in effect tends to give them a complete monopoly." *Williams*, 393 U.S. at 32. Noting that "[c]ompetition in ideas and governmental policies is at the core of our electoral process ...", *id.*, the Court invalidated the Ohio system upon the ground that it

severely limited electoral competition and simply protected the political status quo.

In *Storer v. Brown*, 415 U.S. 724 (1974), this Court suggested yet a third approach. At issue in *Storer* was a California statute that, *inter alia*, imposed petitioning requirements on candidates seeking access to the ballot. In reviewing the statute, this Court inquired as to whether "a reasonably diligent ... candidate [could] be expected to satisfy the [ballot access] requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot?" *Storer*, 415 U.S. at 742. The Court explained that this inquiry requires a careful examination of political realities. It noted: "Past experience will be a helpful, if not always an unerring, guide: it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not." *Id.* In *Storer*, this Court remanded the portion of the case that concerned the petitioning requirements for the lower courts to consider the impact of such requirements on "a reasonably diligent ... candidate." *Id.* at 738, 742.[5]

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[5] The "reasonably diligent ... candidate" standard has not been frequently invoked by this Court. Subsequent to its articulation in *Storer*, it was adopted in a *per curiam* opinion of this Court in *Mandel v. Bradley*, 432 U.S. 173, 177-178 (1977). It was also discussed in three dissenting opinions, *Rogers v. Lodge*, 458 U.S. 613, 636 n.10 (1982) (Stevens, J., dissenting) (endorsing *Storer's* "objective" approach to evaluating the constitutionality of an election regime); *Anderson v. Celebrezze*, 460 U.S. 780, 809-10 (1983) (Rehnquist, J., dissenting) (disputing difficulty of ballot access for independent candidates in Ohio); *Munro v. Socialist Workers Party*, 479 U.S. 189, 205 (1986) (Marshall, J., dissenting) (citing *Storer*) (emphasizing that "the validity of ballot access limitations is a function of empirical evidence"). Although infrequently invoked, the "reasonably diligent candidate" standard has never been repudiated by this Court. And every Circuit Court, including the Second Circuit in *Lopez Torres*, 462 F.3d at 195, that has addressed this standard continues to treat it as good law. *E.g., Perez-Guzman v. Gracia*, 346 F.3d 229, 242 (1st Cir. 2003); *Council of Alternative Political Parties v. Hooks*, 179 F.3d 64, 77 (3rd Cir. 1999) (Alito, J.); *Dart v. Brown*, 717 F.2d 1491, 1503 & n.25 (5th Cir. 1983); *Lee v. Keith*, 463 F.3d 763, 769 (7th Cir.

The application of any of these doctrinal approaches toward the statutory scheme at issue here strongly supports the judgment reached by the court below. The District Court, in this case, developed an extensive factual record and both the District Court and the Court of Appeals engaged in a careful sifting of the facts and weighing of the interests as required by the sliding-scale approach of *Anderson* and its progeny. In doing so, the lower courts properly found that New York's statutory scheme imposed severe burdens upon the rights of voters and candidates. *Lopez Torres*, 462 F.3d at 195. The burdensome petitioning requirements, the difficulties of recruiting delegates to participate in the process and the futility of trying to persuade the delegates chosen by the party leadership to vote against the candidates preferred by the leadership led the Court of Appeals to conclude, in affirming the District Court, that "it is 'virtually impossible' – and perhaps absolutely impossible" for an insurgent candidate to run against the party leadership and secure the nomination of the party. *Id.* at 197. Given the severity of the burdens imposed upon insurgent candidates by the New York statutory framework, the Court of Appeals properly concluded that the state's proffered justifications could not survive heightened scrutiny under the *Anderson-Clingman* line of cases.

Specifically, defendants advanced six justifications in support of the current regime in the courts below: (1) "protecting a political party's associational right to choose its own nominee"; (2) "preventing party raiding"; (3) "promoting geographic diversity and balance on its party ticket"; (4) "promoting racial and ethnic diversity on the bench"; (5) "promoting geographic diversity on the bench"; and (6) "promoting judicial independence by protecting judicial candidates from the 'ill effects of political campaigning.'" *Id.* at 201.

2006); *Manifold v. Blunt*, 863 F.2d 1368, 1374 (8th Cir. 1988); *New Alliance Party v. Hand*, 933 F.2d 1568, 1573 (11th Cir. 1991).

The Court of Appeals correctly found that each of these justifications was insufficient to justify the burdens imposed by New York's judicial election scheme. As a preliminary matter, the court observed that the parties' associational rights do not permit it "to exclude its own members from the nominating" process. *Id.* The court further found that a party's associational interests could be more narrowly pursued by simply promoting its own candidates with supporting informational literature rather than by excluding insurgents from the process. *See Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989). And, the court found that the concern for inter-party raiding, if truly a concern, could be more narrowly addressed by enacting a "one-year affiliation" requirement. *Id.* at 202.

In response to concerns for geographic and racial diversity, the Court of Appeals examined empirical data and properly concluded that those interests did not appear to be well-served by the current system. But, even "[s]etting these empirical doubts to one side," the Court of Appeals identified the creation of judicial districts "that more closely reflect some combination of geographic and racial constituencies" as a less restrictive alternative. *Id.* at 203. In a similar vein, the Court offered a number of alternatives that would advance the asserted interest in judicial independence in a more narrowly tailored fashion than the existing electoral scheme, including public financing for judicial candidates. *Id.* at 204. In sum, the decision of the courts below is fully consistent with the *Anderson-Clingman* standard.

The decision below is also supported by the principles articulated by this Court in *Williams v. Rhodes*. The record in this case fully supports the conclusion that the current regime is designed to insulate the party leadership and its chosen judicial candidates from serious challenge. It thus operates "to freeze the political status quo," *Lopez Torres*, 411 F. Supp. 2d at 255, and to impede the vigorous

"[c]ompetition in ideas and governmental policies" which lie "at the core" of our electoral system. *Williams*, 393 U.S. at 32. Numerous reports and studies considered by the courts below support the observation that the current system simply reinforces the power of the party leadership and effectively prevents intra-party competition in ways that reinforce the political status quo. For example, in 2003, New York State's Chief Judge created a Commission to Promote Public Confidence in Judicial Elections. After conducting a thorough study of the nominating process statewide, the Commission concluded: "[T]he uncontested evidence ... is that across the state, the system for selecting candidates for the Supreme Court vests almost total control in the hands of local political leaders ... and in many parts of the state, being on the dominant party's slate is tantamount to winning the election." *Lopez Torres*, 462 F.3d at 181. The Fund for Modern Courts arrived at a similar conclusion: "Political leaders, not voters, control judicial conventions and decide who will receive the nomination – and thus who will be the judge." *Id.* And a Task Force on Judicial Diversity appointed by former Governor Mario Cuomo agreed: "In practice it is the political party leaders who have the decisive power to determine who will be nominated. Most often this nomination is tantamount to election." *Id.*

Finally, New York's judicial convention system cannot be sustained under the "reasonably diligent ... candidate" test articulated by the *Storer* Court. The experiences of Lopez Torres in her efforts to secure access to the ballot vividly illustrate the obstacles confronting an insurgent candidate. Lopez Torres had substantial popular support in the community; and she was deemed "highly qualified" by party officials. *Id.* at 181. Nevertheless, she could not secure a party nomination, despite her diligent efforts, because she had rebuffed her party's county leader in refusing to hire a clerk whom he had referred to her. *Id.* at 178-181.

Statistics recited by the Court of Appeals reinforce the conclusion that candidates for judicial office in New York are effectively chosen by the party leadership, and that candidates who do not enjoy support of the leadership do not gain access to the party ticket no matter how diligent they may be. The Court of Appeals found that "over a four-year period, almost 90 percent of all delegate races in four judicial districts - including what is perhaps the State's most competitive district - went uncontested, meaning that nearly 9 out of 10 delegates were 'deemed elected' without ever appearing on the ballot. In four counties – Albany, Nassau, Suffolk, and Tompkins – there was not one single contested delegate race." *Id.* at 197-198. "These statistics," according to the Court of Appeals, "starkly illustrate that the structure of the primary election and the petition signature regulations are 'patently exclusionary' with respect to candidates and ultimately voters, who hardly ever receive the opportunity to cast a vote in a delegate race." *Id.* at 198.

In sum, the decisions of the courts below are amply supported by this Court's precedent. Under each of the doctrinal approaches developed by this Court to protect rights of electoral participation, the record adduced in this case supports the invalidation of New York's statutory regime. In combination, the application of these doctrinal standards to the New York system reinforces the correctness of the lower courts' decisions.

II. THE CONSTITUTIONAL PROTECTION OF THE RIGHT TO VOTE AND TO ASSOCIATE IN SUPPORT OF CANDIDACIES REACHES THE RIGHT TO PARTICIPATE IN PRIMARY ELECTIONS

In defense of the current statutory regime, Petitioners argue that the constitutional protection accorded to rights of electoral participation (to vote, to run for office and to associate in support of candidates) does not extend to primary elections, and thus does not assure meaningful participation in a party's nomination process so long as the candidates have reasonable access to the general election ballot. Br. of Pet. State Board of Elections at 15-25. This argument is flawed for several reasons.

First, this Court has long held that the constitutional right to vote embraces the right to vote in a primary as well as in a general election. This was precisely the issue addressed by the Supreme Court in *United States v. Classic*, 313 U.S. 299 (1941). *Classic* involved a criminal prosecution of individuals for fraudulent practices in connection with a primary election for Congress. The prosecution rested upon a statute that made it a crime to conspire to deprive citizens of "the free exercise and enjoyment of rights and privileges secured to them by the Constitution ...." *Classic*, 313 U.S. at 308. The issue before the Court was whether the right to vote in a primary election and the right to run as a candidate in a primary election were rights secured by the federal Constitution.

In addressing the right to vote in primary elections in that case, the *Classic* Court observed:

> That the free choice by the people of representatives in Congress ... was one of the

> great purposes of our constitutional scheme of government cannot be doubted. We cannot regard it as any less the constitutional purpose, or its words as any the less guaranteeing the integrity of that choice, when a state, exercising its privilege ... changes the mode of choice from a single step, a general election, to two, of which the first is the choice at a primary of those candidates from whom, as a second step, the representative in Congress is to be chosen at the election.

Id. at 316-317. Based on that observation, this Court concluded that "[w]here the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary is likewise included in the right protected by Article I, § 2" of the federal Constitution. *Id.* at 318.

Concededly, the constitutional provision at issue in *Classic* was Article I, § 2, pertaining to the election of members of Congress. But this Court has subsequently made clear that the constitutional right to participate in electoral processes, whether grounded in the Fourteenth or Fifteenth Amendments or whether resting upon the First Amendment, extends to primary elections as well as to general elections.

In *Smith v. Allwright*, 321 U.S. 649 (1944), this Court reviewed the refusal to permit a black citizen to vote in a state-mandated primary election of the Texas Democratic Party. In holding that this refusal violated the Fifteenth Amendment, this Court announced: "It may now be taken as a postulate that the right to vote in ... a primary for the nomination of candidates without discrimination by the State, like

the right to vote in a general election, is a right secured by the Constitution." *Smith*, 321 U.S. at 661-662. In *Terry v. Adams*, 345 U.S. 461 (1953), this Court extended its holding in *Smith* to a nomination process administered by what purported to be a private political association, the Jaybird Association, where the private association had been created in a transparent effort to avoid the reach of the Court's decision in *Smith*.

In *Rosario v. Rockefeller*, 410 U.S. 752 (1973), and *Kusper v. Pontikes*, 414 U.S. 51 (1973), this Court addressed the right to vote in primary elections where state laws imposed "waiting periods" for those who wished to vote. *Rosario* involved a requirement that a prospective primary voter must enroll with the party between eight and eleven months prior to the election. This restriction was challenged as a violation of the Fourteenth Amendment protection of the "equal right to vote" and as a violation of the First Amendment right of political association. The *Rosario* Court narrowly upheld the restriction. But, in *Kusper*, the Court invalidated a twenty-three month waiting period for voting in a primary election, concluding that such a restriction imposed a severe burden "upon the right of free political association protected by the First and Fourteenth Amendments." *Kusper*, 414 U.S. at 61.

As a general proposition, therefore, the right to vote in a primary election and to associate in support of candidates in such an election is entitled to well-settled constitutional protection. Moreover, access to the general election ballot, as urged by Petitioners, is no substitute for the rights asserted by plaintiffs in this case. For a member of a major party, the opportunity to petition one's way onto the general election ballot as an "independent" is not the

equivalent of securing the nomination of one's own political party. This is so for two reasons. First, running as an "independent" ignores entirely the First Amendment interest in associating with the political party in which one is a member. Second, as the record in this case makes clear, running as the nominee of a major political party matters significantly when it comes to one's likelihood of prevailing in the general election.

III. THE DECISIONS OF THE LOWER COURTS DO NOT INTRUDE IMPERMISSIBLY UPON THE ASSOCIATIONAL RIGHTS OF THE PARTY LEADERSHIP

In further defense of the current regime, Petitioners assert that the decisions of the lower courts intrude impermissibly upon the associational rights of the party leadership to choose the party's candidates. Pet. State Bd. of Elections Br. at 26-29. Petitioners' argument, in this regard, is conceptually flawed in two important ways. First, it ignores the dual constitutional status of political parties. Second, it seems to rest upon the faulty premise that the rules governing the nomination process at issue in this case were fashioned by the parties, and that plaintiffs' constitutional challenge is directed at internal party rules rather than at state-mandated procedures.

Parties are, in many respects, voluntary political associations and, as such, they are entitled, in most circumstances, to protection by the First Amendment from regulatory intrusion. Such constitutional protection is greatest when a party engages in matters of internal governance, when it develops its policy positions and platforms and when it communicates its policy positions to the public.

Timmons, 520 U.S. at 363; *Clingman*, 544 U.S. at 589-590. *See also Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989) (holding that limitations on endorsements and restrictions on matters of internal governance violate the associational rights of parties). But, in other narrow circumstances, political parties are so inextricably intertwined in the State's electoral process as to be viewed as joint-participants with the State in the administration of the elections.[6] As discussed in connection with *Smith v. Allwright*, *supra* and *Terry v. Adams*, *supra*, such joint participation occurs particularly when parties are engaged in administering the nomination process along with the State. Under such circumstances, the lesson of *Smith* and *Terry* is that the parties are treated, not as autonomous associational entities, but as "state actors" and as such, are subject to constitutional constraints.

Those are the circumstances presented here. The State of New York has prescribed the electoral procedures by which the parties choose their nominees and this suit is directed at those procedures. The State imposes the requirement of a convention. N.Y. Elec. L §§ 6-106, -124. It requires that delegates to that convention be elected. *Id.* at § 6-124. It mandates that to run for election to the convention delegates must circulate designating petitions and further prescribes the numbers of signatures that must be gathered and the time allotted for gathering the signatures. *Id.* at §§ 6-134(4), 136(2)(i), 136(3). It requires that delegates must

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[6] *Cf. Brentwood Academy v. Tennessee Secondary School Ass'n*, 531 U.S. 288, 302 (2001)("Entwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character and judged by constitutional standards; entwinement to the degree shown here requires it.").

gather signatures and run from their own Assembly Districts even though the convention will nominate candidates for judicial office to run, on an at-large basis, from the entire Judicial District. *Id.* at § 6-124.

Although these election procedures clearly implicate the parties as participants in the election process, the parties have been given only a minor role in fashioning the electoral procedures used in New York to select judges. New York's Election Law permits the parties to determine how many delegates will represent each Assembly District at the judicial nominating convention, *id.*, but this limited and state-conferred authority does not turn the convention process into a private arrangement. It does not immunize the state-mandated procedures from meaningful constitutional review. And, such review cannot be regarded as an impermissible intrusion into the associational autonomy of the political parties, any more than the review undertaken by this Court in *Smith* and *Terry*.

Indeed, this case involves less autonomous conduct by the political parties than *Terry*. This is not a case where the political parties, on their own, have devised internal procedures for nominating candidates that are then subject to challenge. This is not a case where the State of New York has decided that rank and file party members should have no say in the nomination of party candidates and that the party leadership should choose the nominees without an election. This is not a case where the State has chosen to define the composition of the electorate that might vote in a primary election but has done so in a way that displeases the political parties. *California Democratic Party v. Jones*, 530 U.S. 567 (2000) (California's decision to open party primaries to all voters held to violate parties' associational rights);

Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986) (Connecticut's refusal to permit party to allow "independents" to vote in party primary held to violate party's right to define its associational boundaries); *see also Clingman v. Beaver, supra* (Oklahoma's refusal to permit parties to open their primary elections to all registered voters held not to violate the First Amendment).

This is a case where the State Legislature has enacted a statutory scheme designed to give party members an electoral voice in the judicial selection process by choosing delegates in a state-run election who later meet in convention to nominate the party's candidates for judicial office. As Justice Kennedy observed in another judicial election case: "The State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgement of speech." *Republican Party of Minn. v. White*, 536 U.S. 765, 795 (2002) (Kennedy, J., concurring). Likewise, in this case, New York cannot opt for an elected judiciary and then deprive voters of a meaningful opportunity to participate in real electoral contests upon the ground that genuine contests would interfere with the autonomy of party leaders to choose the party nominees and the ultimate officeholders.

It is one thing to say that political parties have an associational right protected by the First Amendment to determine who votes in a primary election to choose the party's nominee. Once having decided who is eligible to participate in the nominating process, however, it is a very different proposition to argue that political parties have a First Amendment right to enlist the state's support in running an unfair election. This case involves the latter situation, not the former.

New York can adopt an electoral system, as it has done. Or it can adopt an appointive system. It cannot purport to do both at the same time.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge that this Court affirm the decision of the Court of Appeals.

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Dated: July 13, 2007

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